No. 86-770

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

HENRY HARRIS,
Petitioner,

vs.

MARGARET BLAKE, ELLIS COPELAND, MICHAEL J. GIMMESTAD, and the BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTHERN COLORADO,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. The following letter concerning a graduate psychology student was prepared and circulated:

> May 16, 1979
>
> To Whom It May Concern:
>
> This letter concerns when Henry Harris was registered for and his withdrawal from my Introductory Practicum in Counseling, PCG 612, during Spring Quarter of 1979. Mr. Harris was allowed to withdraw by the Dean of Students long after he had exhibited specific behaviors of being incompetent and unethical in his supervised practicum.
>
> It is my belief that Henry should not be allowed to register for a practicum and that if he does, the practicum should be aware of his past performance.

Is the preparation and circulation of this letter, characterized by the Dean of the School of Education of the University of Northern Colorado as at least bordering on libel with malice, and that a faculty member of the University had no right to place such a memorandum in the student's file, an academic action or a disciplinary action within the context of 42 U.S.C. § 1983?

II. If the preparation and circulation of the letter is academic action, would it be unwarranted judicial intrusion into academic decisionmaking proscribed by *Board of Curators v. Horowitz,* 435 U.S. 78 (1978) for a court to make an exception when a showing is made that the academic action is clearly arbitrary or capricious, or is based on other ulterior motives?

III. Was procedural due process afforded petitioner by a grade appeals procedure which did not permit him to put in evidence of the letter of May 16 and a later letter which attempted to explain it, in order to establish the reason for a sudden drop in grades and refusal to permit him to take a certain course, which resulted in disqualification for further enrollment in a graduate program?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Henry Harris, the Petitioner herein, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit entered on August 14, 1986.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported in the Appendix hereto, *infra*, p. A1. The opinion is reported at 798 F.2d 419 (10th Cir. 1986).

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Tenth Circuit was entered on August 14, 1986, and this petition for certiorari is filed within ninety days from the date thereof. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the Constitution of the United States:

Section 1. Citizenship defined - privileges of citizens. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. Sec. 1983. Civil action for deprivation of rights:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in

an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This is an action brought for vindication of a graduate student's constitutional rights under 42 U.S.C. § 1983, and arose out of the preparation and circulation of two letters, both within and outside the academic community of the University of Northern Colorado. Petitioner (Harris) sought damages and injunctive relief consisting of expunging the letters from his files and records at the University. The University, in effect, confessed this request and voluntarily expunged the letters after suit was filed.

Discovery was completed and a pretrial order approved by the District Court. Thereafter, respondents filed a motion for summary judgment based on depositions and affidavits taken long after the occurrence. The motion was granted and Judgment of Dismissal was entered on March 29, 1983.

A timely notice of appeal was filed with the United States Court of Appeals for the Tenth Circuit. The Court of Appeals affirmed.

Harris was 28 years of age at the time of the events material to this case. He came from a well educated family. He held a Bachelor of Arts degree from the University of Wisconsin. His father is a retired professor, and his mother holds a Bachelor of Arts degree in nursing. Harris was an excellent student and carried the 3.4 to 3.6 grade

average in the graduate program involved in this case. Harris had attended graduate school on a non-degree part-time basis at the University of Illinois. He then became aware of a program at the University of Northern Colorado Center for Special and Advanced Studies (CSAP).

CSAP is not sponsored primarily by the University. It has its own advisory board which is separate and distinct from the University. The instructors keep their own records and files, sign contracts with CSAP, and are paid by it. Instructors from various colleges and universities conduct classes at various locations throughout the country, including Air Force bases.

Harris took a total of seven CSAP courses at different places, but none of these courses was at the University until he enrolled in the course in question. He performed well, and it appeared he would have no difficulty maintaining an average well above the three points required to obtain a graduate degree in clinical psychology.

Harris lived in Boulder, Colorado, and was working the afternoon shift at a furniture factory. He enrolled in Course 612 called Introductory Supervised Counseling at the University which is located in Greeley, Colorado, 51 miles from Boulder. The course was taught by respondent Blake. It was the last course available, and Harris would have to commute to Greeley. He would have preferred the course being taught closer to home.

Harris started having car trouble and on four successive days he called the secretary of the Psychology Department advising her of this fact. No other transportation was available, and hitch-hiking was impractical.

The class met five days a week from 9:00 a.m. until noon. Harris was present on the first Wednesday, Thurs-

day, Friday, and Monday (March 28-April 2, 1979). Harris' car broke down Monday night (April 2) when the driveshaft fell on the street.[1]

Several weeks later Harris met with the Dean of Students to advise that he wished to drop the course. He was instructed to take a note to Blake, and after she signed it, Harris was to bring it back to the dean. Harris was well within the time limit for dropping a course without getting an incomplete. An incomplete becomes a failure if not made up the following quarter. Blake refused to sign the note although called by the Department secretary. The dean signed the note permitting Harris to drop the course.

Thereafter, Harris enrolled in a CSAP course at Davis-Monson Air Force Base. One evening he was called by respondent Copeland and told he could not take the course because Blake had "expressed concerns about you." This was the first time Harris heard about the letter of May 16, 1979, authored by Blake. Harris first saw the letter on October 3, 1979, although he and his father made strenuous efforts to obtain a copy. Harris was transferred to a course being taught in Durango, Colorado, by Dr. Dan Smith, an outside instructor who was acquainted with Blake, and who had received a copy of the May 16 letter. The Court of Appeals characterized that course as "two week-end long sessions, which proved unusual in that Smith repeatedly confronted half of the fourteen-person class about drinking and other disruptive behavior." Harris charges that Smith did not work with him at any point, and that Smith's graduate assistant disparaged him without cause.

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1. The classes actually started on Tuesday, March 27, 1979. However, Harris was unaware of this date since the University program listed the class as starting on Wednesday, March 28.

Harris also claims that he completed all requirements but nonetheless received a "D" as his final grade. This was the first time in his entire scholastic career that he ever received a "D."

Blake concedes she was aware of Harris' problems. However, she stated that she appeared before the CSAP Advisory Board between May 7 and May 16, 1979, and was instructed to write the letter of May 16, 1979, and institute proceedings to oust Harris from the CSAP program.[2] The letter reads as follows:

> To Whom It May Concern:
>
> This letter concerns when Henry Harris was registered for and his withdrawal from my Introductory Practicum in Counseling, PCG 612, during Spring Quarter of 1979. Mr. Harris was allowed to withdraw by the Dean of Students, long after the drop date and after he had exhibited specific behaviors of being incompetent and unethical in his supervised practicum.
>
> It is my belief that Henry should not be allowed to register for a practicum and that if he does, the practicum should be aware of his past performance.

The May 16 letter became a part of Harris' academic file and was disseminated among a number of people. A few of those who were shown or given copies of the letter were respondent Gimmestad, who had no connection with CSAP, respondent Copeland, CSAP coordinator, CSAP director Wood, Dean Arthur Partridge, and Dr. Dan Smith, an off-campus instructor from the University of California at Fresno, along with his graduate assistant, Robert Brown. A school ombudsman also knew about the letter. The

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2. An issue of fact is involved here since respondent Copeland denies such action on the part of the Advisory Board.

meeting where Blake disclosed the contents of the letter to the Advisory Board was witnessed by a number of students who viewed the proceedings behind a one-way mirror.[3] Harris was never, to this day, invited to disclose his position.

After the letter was published, not only was he removed from the CSAP class at Davis-Monson Air Force Base, but two weeks after the May 16 letter, Copeland proceeded to reduce Harris' final grade in his CSAP class from a "B" to a "C." Dr. Smith's grade of "D" effectively reduced Harris' grades from a 3.4 or 3.6 average to a 2.86 causing Harris to be ineligible for further CSAP work, and forcing him to withdraw.

Harris had never met Blake before the practicum.[4] She had attended a convention in Las Vegas and was present at only two of the four classes Harris was able to attend. Harris had personally met her only twice before the May 16 letter. As far as he knew she had not been critical of his performance.

After Harris was given a copy of the letter on October 3, 1979, he and his father arranged for a conference with Gimmestad who directed Blake to explain her letter of May 16. Gimmestad is designated as a chairperson of the Psychiatry Department of the University, and in his deposition stated that the word "unethical" could relate to the student's academic performance, but it could also refer to disciplinary measures. He further stated that he had no evidence that the statements contained in the

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3. It is submitted that this circulation in addition to placing the letter in Harris' academic file is the "stigma" not found in *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972).

4. Practicum is a course of study designed especially for the preparation of teachers and clinicians that allows supervised practical application of previously studied theory.

May 16 letter were untrue, therefore he "assumed" they were true. He had asked Blake to put sufficient information in the file that would be evidence at a later date if they had problems with Harris. This was never done. There are no notes of any kind kept by Blake to substantiate her charges against Harris.

Based on no evidence, or knowledge of Harris, this is the explanation Blake gave to Gimmestad:

> Dear Dr. Gimmestad:
>
> In response to your inquiry about Henry Harris and his performance in my PCG 612 practicum, I am aware of the terms I used in a letter I wrote to be included in Mr. Harris' file. I submit the following in support of my wording:
>
> Incompetence: Inability to verbalize his own and others' perceptions. Lack of attentive behavior, paucity of listening skills. No warmth, genuineness, respect or empathy in his interactions with client or fellow classmates. No confrontive skills. Language inadequacy.
>
> Unethical: Failure to arrange for client contact; lack of follow-through in meeting client. No appearance at feedback session; no contact then or later with professor. Failure to take responsibility for taping; no tape recorder, tapes, or video tape for feedback.
>
> • • •
>
> I had a scheduled feedback session with Henry that was never held. He did not show at UNC campus

again, did not call, nor did he make arrangements to tell his classmates or his instructor or intern that he did not intend to resume practicum.

* * *

That was the last contact I had with Henry Harris. A week before the end of classes, the office called me at home to ask my permission for DaVeda to sign my name to a drop slip for Henry Harris. I said no. Within fifteen minutes, the dean of students' office called and told me that Henry was of course entitled to withdraw from school and that if he dropped all his classes, there would be no record on his transcript that he had even attempted practicum, PCG 612. It was at this that I decided to write a letter for his file, making note that he had enrolled and performed unsatisfactorily in 612.

This was followed by a memorandum from Dr. Arthur Partridge, Dean of the School of Education, which states in part:

* * *

I have now determined that neither the faculty member nor the University had a right to place such a memorandum in a student's file, and under the Buckley amendment Mr. Harris certainly has the right to challenge this part of the record.

On its face, the memorandum at least borders on libel with malice. Aside from ethical issues, the longer this stays in his file, the more vulnerable Dr. Blake is and that vulnerability could extend to the "official custodian" of the department record.

Dr. Partridge asked for and received all available copies of the May 16 letter. Harris was never allowed to

challenge "this part of the record." After suit was filed, it appears that both letters were expunged from Harris' academic file.

Blake had seen Harris only twice during the course. While Harris did not violate any rules or regulations by officially withdrawing, she refused to permit him to withdraw, and wanted to give him an "incomplete." This would in turn become a failure if the course was not made up during the next quarter.

In her deposition, she stated that Harris was incompetent because he had a poor session with one "client" which she did not see. When it is said, "He's no good"—that's pretty close. She talked to Harris about 10-15 minutes on April 6, and had a very short conversation with him on April 9. Her charge that Harris was unethical was apparently based on these two conversations, and a missed conference with a "client." She offered no other explanation or other instances of observation.

Blake did not want Harris to attend any more practicums. She did not know Harris' scholastic attainments in CSAP or at other universities. She made no effort to seek such information because "it was no concern of hers." Even if he had "straight A's," she didn't care. As a psychologist making an evaluation of an individual, it was not important to know his background. Blake admitted that if her wishes were followed, Harris would not become a psychologist. Keeping him from being a psychologist was the end result of what she was doing. These are her own words.

She had made an affidavit in support of the motion for summary judgment to the effect that Harris' grade average was too low to allow him to register in future

courses, but conceded she didn't know the basis of the statement. It was a remark she had heard "somewhere, someplace."

When the Dean of Students called her and said Harris was entitled to withdraw, it was at that point that she decided to write the May 16 letter. She disagreed with the criticism of Dr. Partridge, but admits her letter contained "very strong language." She finally said she was willing to call Harris incompetent because he was not present for further sessions, and did not come back. Before the course started, Blake had announced that students would not complete the course if they missed one class.

Harris appeared before the University Academic Appeals Board to challenge the two grades which deprived him of continued enrollment as well as the May 16 letter. His attorney was directed to leave the room. Over his protests Harris was represented by a University professor. The Board refused to review the "D" grade given by Dr. Smith, claiming the appeal was not timely filed. The Board also declined to review the impact and truthfulness of the May 16 letter since it had been expunged from the files. There is no transcript of the hearing, and Blake was not called to give evidence in support of the allegations contained in the letter. The only matter considered was Copeland's changing the "B" to a "C."

The letter delayed Harris for at least two years in obtaining his M.A. in Psychology, which he received from a school of far less renown. Also, there are serious questions as to whether or not he can seek a doctorate. Other items of damage such as mental anguish, fear, anger, lost earnings, inconvenience, and lack of confidence in himself, appear throughout his depositions.

REASONS FOR ALLOWANCE OF THE WRIT

I.

Petitioner was deprived of a property interest in continued enrollment and a liberty interest in his inability to pursue a career in psychology by being denied procedural and substantive due process since the letter of May 16, 1979, was disciplinary action rather than academic action.

On appeal, the record and all inferences arising therefrom are viewed in the light most favorable to the nonmoving party. *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464 (1962). Mention is made of this fundamental rule for the reason that not only are issues of material fact raised in a few areas, but the respondents at times disagree among themselves, and even take issue with actions taken by their superior with regard to the May 16 letter.

The Due Process Clause applies when government has deprived an individual of an interest in liberty or property. *Board of Regents v. Roth, supra.* See also *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78 (1978). Starting with this premise, the Court of Appeals referred to its decision in *Gaspar v. Bruton*, 513 F.2d 843 (10th Cir. 1975), which held that an individual enrolled in a post-secondary nursing program had a protected propery interest. E.g. *Goss v. Lopez*, 419 U.S. 565 (1975), which recognized a property interest in a public education. Noting that the Colorado Legislature had directed that the state's college system "shall be open . . . to all residents in this state" upon payment of a reasonable tuition fee, Colo. Rev. Stat. § 23-50-109 (1973), the Court of

Appeals held that Harris had a property interest in CSAP enrollment which entitled him to procedural due process.

However, the Court of Appeals, relying on *Board of Curators v. Horowitz, supra,* by characterizing Blake's actions as academic in nature, held that Harris was entitled only to the minimal procedures approved in that case.

In *Horowitz,* a student was dropped from medical school because of faculty dissatisfaction with her clinical progress, peer and patient relations, personal hygiene, and inability to accept criticism. However, contrary to what happened here, the student was given every opportunity to improve her performance, had been given special oral and written examinations, and had been interviewed and evaluated by no less than seven practicing physicians. This Court, assuming the existence of a liberty interest, held that the student had been awarded at least as much due process as the Fourteenth Amendment required.[5] But, nevertheless, when a student is dismissed for *purely academic* reasons, no hearing is required.

However, the Court injected a possible exception into the case: that academic dismissals from state institutions can be enjoined if "shown to be arbitrary or capricious." In this regard, the Court pointed out that a number of lower courts have applied the dictum that academic dismissals from state institutions can be enjoined if "shown to be clearly arbitrary or capricious." Attention was directed to *Gaspar v. Bruton, supra,* at page 850, and citations therein. The Court went on to say that even assuming that the courts can review under such a standard an academic decision of a public educational institution, the Court agreed with the District Court that

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5. Horowitz never alleged the deprivation of a property interest as has Harris. The Court of Appeals agreed with Harris.

there had been no such showing. Therefore, this appears to be a question that should be decided by the Court. The facts in the instant case are far more susceptible of such an interpretation as those in *Horowitz*. In passing, it is noted that the District Court in this case had made a finding of no arbitrariness or capriciousness which indicates it accepted what this Court called dictum.

A meaningful comparison of the facts in *Horowitz* and those in the instant case is utterly impossible. Harris' infractions consisted of being unable to attend classes by reason of car trouble coupled with a round-trip of 102 miles. He notified the proper persons of his difficulties. Being advised that missing even one class would terminate a student, he requested that he be dropped from the class. Blake objected for reasons never made clear. She was overruled by the Dean of Students. By her own admission, Blake, knowing hardly anything about Harris, and his fine academic record in CSAP and other universities, and admittedly not caring, decided to write the harsh and scandalous letter which it is claimed, with a great deal of justification, led to Harris being forced out of the CSAP graduate program. He had no opportunity to defend himself, improve his performance, if necessary, or do anything that would keep him in the program. He was not notified of the fact that the letter was placed in his file until he was advised during the summer by Copeland. Even then, he had difficulty obtaining the letter, and did not obtain it until October 3. He was given no opportunity to save himself except through the appeals procedure, which was no procedure at all.[6]

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6. Cf. *Gray Panthers v. Schweiker*, 652 F.2d 146 (D.C. Cir. 1980), where the student participated in a months-long inquiry into his academic performance, numerous meetings and discussions with faculty members and reviewed his perceived shortcomings, and what would be expected of him.

Several lower courts appear to harbor some doubts about the Court's holding in *Horowitz* regarding hearings in academic cases. In *Clark v. Whitney*, 607 F.2d 634 (4th Cir. 1979), it was said that this Court suggested "if it did not flatly hold" that in an academic (as distinguished from a disciplinary) dismissal, a hearing is not required by the Due Process Clause.

In *Debra P. v. Turlington*, 654 F.2d 1079 (5th Cir. 1981), the Court of Appeals stated that in *Horowitz*, the Supreme Court has "indicated" that the minimum due process of *Goss* is limited to disciplinary determinations that inhibit a student's access to education.

Schuler v. University of Minnesota, 788 F.2d 510 (8th Cir. 1986), took the position which appears to be correct: Whether a student subject to an academic dismissal may maintain a cause of action of his or her right to substantive due process was left open in *Horowitz*.[7]

Furthermore, *Horowitz* does not have the sharp criticism of a professor's actions as here. See Dean Arthur Partridge's letter, *supra*, at page 9. That letter contains this conclusion:

> If Dr. Blake had a reasonable factual basis for accusing Mr. Harris of being unethical and incompetent, she should have filed some sort of charge. That, I think, would have been proper procedure. I believe, however, that this sort of memorandum with no supporting data and no specification of charges is most inappropriate.

When the Dean is referring to "charge" and "charges," he clearly was thinking in terms of disciplinary action.

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7. The language in 435 U.S. at 91-92 appears to be susceptible to this interpretation.

A "charge" has many meanings, but within the context of this case, is an accusation usually having serious consequences.

The Court of Appeals also pointed out that "Dean Partridge flatly termed it 'most inappropriate' for an academic evaluation."

It is difficult to perceive any justification for Blake's actions. They were triggered by pique—being overruled by the Dean of Students. Indeed, it would be intolerable if school authorities, without recourse, are permitted to place malicious, scandalous, and defamatory material in a student's file under the guise of being an academic critique. An academic evaluation based on sufficient experience and objectivity is one thing. The harsh opinions contained in the May 16 letter, if such statements can be called opinions, based on hearsay and prejudice, and little contact with the student, is quite another matter. The National Education Association's Code of Student Rights and Responsibilities states:

> Records are kept to assist the school in offering appropriate educational experiences to the student. The interest of the student must supersede all other purposes to which records might be put.

When discipline is involved, an entire new panoply of constitutional rights appear, including the right to explain, defend, and have a hearing, albeit an informal one. *Goss v. Lopez, supra.* There is no dispute that Harris was not afforded such rights before the letter was written, circulated, and placed in his file without his knowledge or his being given an opportunity to object, and that the purpose of the letter was to preclude Harris, from becoming a psychologist. Even respondent Gimmestad conceded

that the letter could refer to a disciplinary matter. In *Goss*, the Court concluded:

> [It] would be a strange disciplinary system in an educational institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereliction and to let him tell his side of the story in order to make sure that an injustice is not done.

The lower court relied heavily on the explanatory letter written by Blake on October 9, 1979. The letter was written long after the first letter, and can only be interpreted as defensive in nature. It could not undo the damage already done. Again, Harris was never given an opportunity to refute the harsh criticisms contained therein, or the truth of the facts as alleged by Blake.

The Court of Appeals did not approve of Blake's actions, and stated that arguably, both the May 16 letter, and the poor grades subsequently received by Harris, were not the careful evaluations in the sense intended by *Horowitz*. In fact, the Court of Appeals pointed out that the record revealed that a fact issue "exists over whether Blake's actions in writing the May 16 letter and placing it in Harris' file were appropriate academic procedures." It was further stated that a fact issue also exists concerning whether the letter affected the grades given to Harris by Smith and Copeland. If so, this clearly would be arbitrary state action. (Harris' position)

It is submitted that the line of demarcation between academic and disciplinary actions has not been clearly defined by the Court. *Horowitz* certainly does not do so. The line might be blurred at times, and actions on the part of school authorities may be a mixture of both academic and disciplinary actions. The Court's consideration

of this most important matter is vital and necessary. In fact, in *Horowitz,* the Court cited *Greenhill v. Bailey,* 519 F.2d 5 (8th Cir. 1975), which held that a hearing was necessary where a medical school not only dismissed a student for academic reasons, but also sent a letter to the Liaison Committee of the Association of the American Medical Colleges suggesting that the student either lacked "intellectual ability" or had insufficiently prepared his course work. The *Greenhill* court specifically noted that "there has long been a distinction between cases concerning disciplinary dismissals, on the one hand, and academic dismissals, on the other," and emphasized that it did not wish to "blur that distinction." However, the court felt that the publicizing of an alleged deficiency in the student's intellectual ability removed the case from the typical instance of academic dismissal and called for greater procedural protections. *Id.* at 9.[8]

It is respectfully suggested that there was sufficient publication in this case to bring it within the reach of *Greenhill.*

II.

If the Court finds that the preparation and circulation of the letter of May 16, 1979, was an academic matter, then Harris may still maintain a cause of action for violation of his right to substantive due process.

In *Horowitz,* the Court mentioned but did not decide an exception that when a student is dismissed for "purely

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8. *Greenhill* further held that a student must be accorded an opportunity to appear personally to contest the allegations of academic deficiency. The court recommended an "informal give and take" between the student and the administrative body dismissing him.

academic" reasons, no hearing is required, when it was stated that the respondent pointed out that the Court of Appeals expressly failed to reach the substantive due process ground advanced by Horowitz. Respondent was relying on a number of lower court decisions that had implied in dictum that academic dismissals from state institutions can be enjoined if "shown to be clearly arbitrary or capricious." See *Gaspar v. Bruton, supra,* and citations therein. The Court stated that even assuming that the courts can review an academic decision of a public educational institution under such a standard, it agreed with the District Court that no showing of arbitrariness or capriciousness had been made.

The District Court in this action ruled as a matter of law that no such showing had been made, and the ruling was approved by the Court of Appeals. It is Harris' position that under the facts of this case, which will not be repeated here, the question was one properly reserved for the jury if the Court carves out this exception. It would be particularly appropriate here since Harris charges the respondents with arbitrary state action of the most egregious nature.

It is submitted that there need be no fear of a rash of lawsuits if the Court adopts the dictum mentioned in *Horowitz* since it would be a rare occasion when a school official would react to being overruled by higher authority as did Blake.

III.

Arbitrary state action should be implied, and a full hearing required.

Procedural due process was not afforded Harris by a grade appeals procedure which did not permit him to

put in evidence the letter of May 16, and a later letter which attempted to explain it, in order to establish the reason for the sudden drop in grades and refusal to permit him to take a certain course, which resulted in his disqualification for further enrollment in the graduate program.

While *Horowitz* has decided that no hearing at all is required in a purely academic matter, it is suggested that where the student's complaint about a sudden drop in grades is tied to a forced withdrawal from a class (Davis-Monson Air Force Base), and withdrawal from a graduate program, all of which he claims was caused by a harshly worded letter, he raises grave possibilities of arbitrary state action which requires at least the type of hearing suggested by *Goss.*

The opinion of the Court of Appeals contains conclusionary statements which appear to have no factual basis in the record. As heretofore stated, the Court of Appeals said that arguably, both the May 16 letter and the poor grades received by Harris, were not careful evaluation in the sense intended by *Horowitz.* We cannot disagree. However, the Court of Appeals goes on to state that there was an extensive hearing. We find nothing in the record upon which to base this statement. Contrary to a statement contained in its opinion, only the Copeland grade was considered. The hearing was fatally defective in that it did not probe the impact of the letter. Nor did the Board call Blake for an explanation. This is so even after the letter was expunged and Blake severely criticized by her superior. No reference to the letter was allowed because it was expunged, and Harris was denied legal assistance. His counsel was told to leave the room, and a transcript was not prepared. There are doubts as to whether the

hearing was fully recorded. No court reporter was present. No written report has been seen by Harris or his counsel.

The Court of Appeals also states that Harris could place his own explanatory letter in the file. There is no such rule in the record, nor is Harris aware of such a privilege. Even if such a rule or practice existed, the damage had been done, and a Harris explanation would merely pose questions of credibility. He could not and would not be reinstated in view of the type of hearing he received.

It is further stated that Harris had several opportunities to present his position to school officials. He did talk to Gimmestad who did nothing. He spoke to Dean Partridge who wrote a scathing letter to Blake, and expunged the May 16 letter after the damage was done. Harris talked to Copeland who not only removed him from the Davis-Monson course, but lowered his grade. He did nothing further. Harris appealed to the Academic Appeals Board as hereinabove related. Again, nothing was done.

In spite of the history of non-activity on the part of the University officials, the Court of Appeals relied on *Regents of the University of Minnesota v. Ewing*, ... U.S. ....., 106 S.Ct. 507 (1985), where a student was denied the right to retake a test when other failing students were given this privilege. This Court held that the record showed that the decision was made conscientiously, and with careful deliberation, "based on an evaluation of the entirety of Ewing's academic career." The difficulty here is that none of this happened with regard to Harris. The Court went on to say:

> Plainly, they [courts] may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment. (*Id.* at 513)

Finally, the Court of Appeals found that Harris has failed to show that the decision of the Academic Appeal Board was not made with conscientious deliberation through the exercise of professional judgment. Enough has been said about the hearing. An incomplete hearing under the circumstances of this case is no hearing at all.

CONCLUSION

It is respectfully submitted that *Horowitz* should be reexamined and explained in the area of the academic-disciplinary dichotomy.

Also to be examined and decided is whether purely academic action, if found in this case, may still deprive a student of substantive due process if such action is arbitrary and capricious, or is the result of malice, ill will, or some other ulterior motive.

Finally, while a full judicial-type hearing is not required in disciplinary proceedings, does that rule embrace an incomplete hearing which is bereft of the crucial issues which brought on the hearing in the first place?

Harris was ill treated and blatantly deprived of his right to continue enrollment in the CSAP graduate program. He was denied any remedy through University or CSAP procedures, and was the victim of arbitrary state action which was disciplinary in nature. He had a property interest in the CSAP enrollment, and a liberty interest

in his ability to pursue a career in psychology. Thus, he was entitled to and denied both procedural and substantive due process.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

(Filed Auguest 14, 1986)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HENRY HARRIS, Plaintiff-Appellant,	)	
v.	)	No. 83-1524
MARGARET BLAKE, ELLIS COPELAND, MICHAEL J. GIMMESTAD, and THE BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTHERN COLORADO, Defendants-Appellees.	)	

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 81-Z-780)

Joseph P. Jenkins of Estes Park, Colorado, for Plaintiff-Appellant.

David R. Brougham (Gordon L. Vaughan with him on the brief) of Hall & Evans, Denver, Colorado, for Defendants-Appellees.

Before McKAY, SETH, and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

Henry Harris brought this action under 42 U.S.C. § 1983 (1982), alleging that his rights to procedural and substantive due process were violated when he was required to withdraw from a program of graduate study. The district court granted summary judgment in favor of all defendants. We affirm.

I.

Summary judgment is inappropriate unless there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Clark v. Atchison, Topeka & Santa Fe Ry.*, 731 F.2d 698, 700 (10th Cir. 1984); *Western Casualty & Surety Co. v. National Union Fire Insurance Co.*, 677 F.2d 789, 791 n.1 (10th Cir. 1982). On appeal, the record is properly viewed in the light most favorable to the nonmoving party. *Clark*, 731 F.2d at 700; *Luckett v. Bethlehem Steel Corp.*, 618 F.2d 1373, 1377 (10th Cir. 1980). Viewed according to this standard, the record reflects the following facts.

In the spring of 1979, Harris was a part-time graduate psychology student in the University of Northern Colorado's Center for Special and Advanced Programs (CSAP), a master's degree program designed for off-campus students. Harris enrolled in a counseling course taught by Professor Margaret Blake. In order to attend classes, he had to commute daily from Boulder to Greeley. His car broke down after four classes, and he could not arrange for other transportation. He left several telephone messages with Blake's office, explaining his absence and ultimately notifying her that he would have to withdraw from the course. He did withdraw in early May.

It is unclear what happened during the four classes he did attend. Blake was present for two of those sessions, neither of which seems to have been exceptional in any way. When she was away at a convention, the class was taught by a graduate assistant, who supervised the students' counseling of volunteer clients. Harris failed to obtain a client of his own and to provide a videotape cassette, both of which were required. His counseling of a volunteer client supplied by another student was observed by the graduate assistant and other members of the class. Among other things, Blake asserts that Harris could not maintain a conversation with the client. Harris responds that he followed instructions not to speak excessively. After his car broke down, he failed to notify the client that he was unable to keep a scheduled appointment. He also missed at least one conference with Blake, although it may have been scheduled to take place after he stopped attending class.

Dissatisfied with Harris' performance, Blake expressed her concerns to Professor Gimmestad, chairman of the psychology department. Subsequently, Harris attempted to obtain Blake's permission to withdraw from the class, but she refused to authorize it. When Harris withdrew via proper administrative channels, Blake consulted with the CSAP Advisory Committee because she wanted the opportunity to evaluate his performance. Professor Ellis Copeland chaired this committee in his capacity as CSAP academic coordinator. Although Blake testified that the committee recommended she put her concerns in writing, Copeland does not recall a formal recommendation. Blake also states that she was instructed to institute proceedings to "oust" Harris from CSAP.

On May 16, Blake wrote the letter which ultimately led to this lawsuit. Addressed "To Whom It May Concern," the text reads as follows:

> "This letter concerns when Henry Harris was registered for and his withdrawal from my Introductory Practicum in Counseling, PCG 612, during Spring Quarter of 1979. Mr. Harris was allowed to withdraw by the Dean of Students, long after the drop date and after he had exhibited specific behaviors of being incompetent and unethical in his supervised practicum.
>
> "It is my belief that Henry should not be allowed to register for a practicum and that if he does, the practicum should be aware of his past performance."

Rec., vol. I, at 8. The May 16 letter became a part of Harris' academic file and was disseminated among some of CSAP's instructors and administrative personnel.

After the May 16 letter was written, the Advisory Committee met to consider the case. The committee determined that no action should be taken to remove Harris from CSAP but that future instructors should be informed of his performance in Blake's course. Although Copeland had read the letter, the committee did not review it or decide that it would serve as the means of informing other instructors.

Copeland called Harris in late May or early June. Harris had registered for another counseling course, and Copeland notified him that he would instead have to take the course at a different location with Professor H. Dan Smith. Smith was associated with the University of Fresno in California and had been hired by CSAP as a visiting professor. During that conversation, Copeland

mentioned the May 16 letter and told Harris that Blake had several concerns about him.

Harris enrolled in the course indicated by Copeland. Smith had somehow received a copy of the May 16 letter but did not mention this to Harris. The course consisted of two weekend-long sessions, which proved unusual in that Smith repeatedly confronted half of the fourteen-person class about drinking and other disruptive conduct. Harris claims that Smith did not work with him at any point and that Smith's graduate assistant disparaged him without cause. He also claims that he completed all requirements but nonetheless received a "D" as his final grade.

Harris previously had received an "incomplete" in a CSAP course taught by Copeland. He fulfiled the outstanding requirements by the spring or early summer of 1979, and Copeland gave him a "C" as his final grade. He had been doing "B" work in the first half of the course, and the final paper he wrote was never returned to him. He had earned A's and B's in the other CSAP courses he had taken. One or both of the grades Harris received from Smith and Copeland lowered his average below the required minimum and effectively compelled his withdrawal from CSAP.

During the summer or early fall, Harris tried unsuccessfully to obtain a copy of Blake's letter by mail. At the beginning of October, he went with his father to the CSAP office, where Copeland gave him a copy. After speaking with Copeland, they proceeded to Professor Gimmestad's office and insisted upon seeing him. Their conversation was heated, and Harris demanded to know how and why the letter had been placed in his file. At

Harris' request, Gimmestad obtained an explanatory letter from Blake. That letter, dated October 9, explained her original use of the terms "incompetent" and "unethical" as follows:

> "Incompetence: Inability to verbalize his own and others' perceptions. Lack of attentive behavior, paucity of listening skills. No warmth, genuineness, respect or empathy in his interactions with client or fellow classmates. No confrontive skills. Language inadequacy.
>
> Unethical: Failure to arrange for client contact; lack of follow-through in meeting client. No appearance at feedback session; no contact then or later with professor. Failure to take responsibility for taping; no tape recorder, tapes, or video tape for feedback."

Rec., vol. I, at 9. The letter also detailed the basis for these conclusions, including Harris' failure to provide his own client and his subsequent failure to inform the client he "borrowed" that he would not be able to attend the next scheduled session. *See id.* at 10.

Harris was not satisfied with Blake's explanation. Pursuing channels within the administration, Harris ultimately persuaded Arthur Partridge, Dean of the College of Education, to have the May 16 letter removed from his file. Partridge's written directive stated that the letter should not have been placed in Harris' file. After referring to the threat of legal action and requesting all copies of the May 16 letter, the Dean concluded:

> "If Dr. Blake had a reasonable factual basis for accusing Mr. Harris of being unethical and incompetent, she should have filed some sort of charge. That, I think, would have been proper procedure. I believe, however, that this sort of memorandum with no supporting data and no specification of charges is most inappropriate."

Id. at 90.

Harris also lodged an official grievance with the school's Academic Appeal Board. He challenged the grades he had received from both professors who had seen the May 16 letter as well as the conduct of Blake and Copeland concerning the letter. After a hearing in which Harris participated, the Appeal Board upheld the grades and declined to rule on the other charges since the letter had been expunged.

One year after the May 16 letter was written, Harris filed this lawsuit and a related action in state court. His federal complaint essentially alleged that he was deprived of a property interest in continued enrollment and a liberty interest in his ability to pursue a career in psychology. He claimed that the conduct of Blake, Copeland, and Gimmestad denied him both procedural and substantive due process and that the Board of Trustees was liable for these violations. In granting defendants' motion for summary judgment, the district court characterized Blake's evaluation as academic rather than disciplinary and ruled that no hearing was required under *Board of Curators v. Horowitz*, 435 U.S. 78 (1978). The court also held that any claim of defamation was foreclosed by *Paul v. Davis*, 424 U.S. 693 (1976). Finally, the court found no indication of arbitrariness, capriciousness, or bad faith to support

the alleged violation of substantive due process.[1] *See Horowitz,* 435 U.S. at 91-92.

II.

The Due Process Clause applies when government has deprived an individual of an interest in liberty or property. *Board of Regents v. Roth,* 408 U.S. 564 (1972); *see also Horowitz,* 435 U.S. at 82. In *Gaspar v. Bruton,* 513 F.2d 843, 850 (10th Cir. 1975), we held that an individual's place in a post-secondary nursing program constitutes a protected property interest. We relied in part upon *Goss v. Lopez,* 419 U.S. 565 (1975), which recognized a property interest in public education. In *Goss,* the State of Ohio had entitled its residents to a primary and secondary education. *See id.* at 573. Colorado has created the basis for a similar claim of entitlement to an education in its state college system, which includes the University of Northern Colorado. The legislature has directed that these colleges "shall be open . . . to all persons resident in this state" upon payment of a reasonable tuition fee. Colo. Rev. Stat. § 23-50-109 (1973). The actual payment of tuition secures an individual's claim of entitlement. *See Gaspar,* 513 F.2d at 850. Accordingly, Harris had a property interest in his CSAP enrollment which entitled him to procedural due process.[2]

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1. Alternatively, the court ruled that neither the individual defendants nor the Board of Trustees could be required to stand trial under the doctrine of qualified immunity and the Eleventh Amendment respectively. In view of our disposition of this appeal, we need not consider these rulings.

2. Harris also asserts that he was deprived of liberty interests in his good name and reputation and in his ability to pursue a career in psychology. If his forced withdrawal had been accompanied by public dissemination of the reasons and if those reasons could have stigmatized his reputation or foreclosed

(Continued on following page)

"The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961). The Supreme Court has emphasized that less stringent procedural requirements attach when a school makes an academic judgment about a student than when it takes disciplinary action. *See Horowitz*, 435 U.S. at 85-91. In *Horowitz*, a medical student challenged her school's failure to provide a hearing before her dismissal. The student had been informed of deficiencies in her academic performance and, in addition, had received numerous reviews of her work and opportunities to improve. *See id.* at 80-82. The Court held that the process she received, notice followed by a careful and deliberate determination, satisfied the requirements of due process. *See id.* at 85.

Harris contends that placing the May 16 letter in his file was disciplinary rather than academic in nature, arguing that it was done to punish him because he missed classes and later withdrew. Like the district court, how-

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Footnote continued—

his future career plans, Harris would have been entitled to a name-clearing hearing. *See Miller v. City of Mission*, 705 F.2d 368, 373 (10th Cir. 1983). The record contains no evidence that the May 16 letter was disseminated to anyone not connected with CSAP. We have held in an employment context that "such intra-government dissemination, by itself, falls short of the Supreme Court's notion of publication." *Asbill v. Housing Authority of Choctaw Nations*, 726 F.3d [sic] 1499, 1503 (10th Cir. 1984). Nor is there evidence that Harris suffered the requisite injury to his reputation or that he was denied enrollment elsewhere as a result. Indeed, by the time of his second deposition, Harris had received an M.A. in clinical psychology from Antioch College and was working on a master's degree in sociology and psychology at the University of Colorado. Given our ultimate conclusion that Harris received procedural and substantive due process, we need not consider whether a graduate student is deprived of liberty when forced to withdraw for reasons which are not made public. *See Horowitz*, 435 U.S. at 83-84 (issue not reached).

ever, we believe that the decisions affecting Harris were academic rather than disciplinary. The evidence is undisputed that attendance at each class session was critical because the course was a practical one in counseling methods, involving actual participation and observation. The students were so informed and were told they could not be absent. Attendance was thus an academic requirement. Blake's explanatory letter of October 9 clarifies that her concerns were academic, not disciplinary. *See Mauriello v. University of Medicine and Dentistry of New Jersey*, 781 F.2d 46, 50 (3d Cir. 1986) (evaluation focused on quality of research and dedication to academic pursuits, not misconduct). Although the May 16 letter may have been prompted by Harris' withdrawal, there is no dispute on this record that Blake's purpose was to ensure that he would be evaluated for his actual performance in class notwithstanding his withdrawal. Harris was thus entitled only to the minimal procedures discussed in *Horowitz*.

Arguably, both the May 16 letter and the poor grades Harris received were not careful evaluations in the sense intended by *Horowitz*. Although the letter pertained to academic matters, it may nonetheless have been ill-considered. Dean Partridge flatly termed it "most inappropriate" for an academic evaluation. Harris charges that the grades which forced his withdrawal were not the product of careful deliberation or even inadvertence but rather were foregone conclusions based upon the improperly written letter. Under *Horowitz*, however, the procedures Harris received were more than adequate to protect his property interest in continued enrollment. CSAP provided an established appeals procedure which culminated in a hearing before the school's Academic Appeal Board. Harris employed that procedure and participated personally in the

hearing to challenge his grades. Independent review confirmed the propriety of the grades and further demonstrated that the ultimate decision concerning his case was a careful one.

Harris urges that he was entitled to challenge the initial placement of the May 16 letter in his academic file. Due process, however, required that CSAP protect only against the deprivation of Harris' constitutionally protected interest in continued enrollment. That interest was not necessarily jeopardized by an unfavorable letter of evaluation. *Cf. Horowitz,* 435 U.S. at 85 (notice required when cumulative academic deficiencies created risk of dismissal).

Even if CSAP were constitutionally required to take action with respect to Blake's evaluation, the procedures followed were sufficient. Harris was notified of the letter's existence and nature. Although Harris was unable to obtain a copy by mail, Copeland gave him one when asked in person to do so. Gimmestad obtained an explanatory letter for him from Blake. Harris then appealed until the letters were removed from his file. In short, he received several opportunities to present his position to responsible school officials. It is also uncontroverted that Harris was entitled to place his own explanatory letter in the file and that the Appeal Board was prepared to consider any charges concerning the May 16 letter had it not already been expunged. The requirements of procedural due process were therefore satisfied with respect to Blake's evaluation as well as the challenged grades.

III.

The Due Process Clause not only provides a procedural safeguard against deprivations of life, liberty, and

property but also protects substantive aspects of those interests from unconstitutional restrictions by government. *Hewitt v. City of Truth or Consequences,* 758 F.2d 1375, 1378 (10th Cir. 1985), *cert. denied,* 106 S. Ct. 131 (1985); *see also Kelley v. Johnson,* 425 U.S. 238, 244 (1976). We have already held that Harris had a property interest in his post-graduate education. He contends further that defendants' actions which resulted in his dismissal from the program were so arbitrary that they denied him substantive due process.

In *Regents of the University of Michigan v. Ewing,* 506 S. Ct. 507 (1985), a student was dismissed from a medical program when he did not pass a required examination. He alleged that his dismissal was arbitrary and capricious because he was denied permission to retake the test although other failing students were routinely allowed to do so. The Court assumed without deciding that a graduate student's interest in continued enrollment constitutes a property interest warranting substantive protection. *See id.* at 512. In assessing Ewing's claim, the Court pointed out that the procedures used by the university had been fair, and that the university had not concealed nonacademic or constitutionally impermissible reasons for dismissal. *See id.* at 513. The Court then stated:

> "Ewing's claim, therefore, must be that the University misjudged his fitness to remain a student in the Inteflex program. The record unmistakably demonstrates, however, that the faculty's decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's academic career. When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's

> professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."

Id. at 513 (footnote omitted).

The Court's approach in *Ewing* is dispositive of Harris' claim. He does not assert that the CSAP procedures he used to appeal his grades were unfair. Moreover, there is no evidence in this record that any of the CSAP personnel who were involved harbored nonacademic or unconstitutional motives for effecting his withdrawal. As in *Ewing*, the essence of Harris' claim is that defendants misjudged his fitness to remain a student. We must therefore review the record to determine whether the evidence, viewed most favorably to Harris, unmistakably demonstrates that defendants' decision was "made conscientiously and with careful deliberation," or whether the record shows "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Id.*

The record reveals that a fact issue exists over whether Blake's actions in writing the May 16 letter and placing it in Harris' file were appropriate academic procedures. A fact issue also exists concerning whether the letter affected the grades given to Harris by Smith and Copeland. However, Harris was given the opportunity to challenge the letter and the grades before the Academic Appeal Board. It is the Board's decision that ultimately resulted in Harris' forced withdrawal, and Harris has failed to show that this decision was not made with conscientious

deliberation through the exercise of professional judgment. It is undisputed that unbiased faculty members have considered Harris' case and have exercised their own judgment concerning the propriety of the grades that compelled his withdrawal. Accordingly, Harris has failed to support the alleged denial of substantive due process.

The judgment of the district court is affirmed.